Supreme Court of the United States

OCTOBER TERM, 1947

No. 545

STATE OF INDIANA, ON RELATION OF JOHN L. MAVITY,
Appellant,

vs.

ROBERT H. TYNDALL, WILLIAM H. REMY, PAUL ROBERTSON, SMILEY N. CHAMBERS, CLIFFORD F. BEEKER, JESSE P. McMURTRY,
Appellees.

APPEAL FROM THE SUPREME COURT OF THE STATE OF INDIANA

PETITION FOR REHEARING OF APPEAL AND TO VACATE ORDER OF DISMISSAL.

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner, being entirely ignorant of and not informed of why and for what reason this Court entered its order of February 16, 1948, dismissing his appeal "for want of a *substantial* federal question" concludes that petitioner

either failed to clearly state his grounds or reasons or was too concise and too brief, or that this Court overlooked or misapprehended certain material matters and facts therein contained.

Petitioner, therefore, adopts and makes a part hereof his jurisdictional statement previously filed, and would respectfully point out the following additional grounds touching the substantiality of the question presented.

I.

THE SUPREME COURT OF THE UNITED STATES HAS NEVER DURING ITS EXISTENCE, SINCE DECEMBER 7, 1787, PASSED ON THE QUESTION OF WHETHER THE TAKING AND PERMANENT RETENTION OF FINGERPRINTS AND "ROGUES GALLERY" PICTURES OF CITIZENS, GUILTY OR INNOCENT, BY POLICE OFFICERS AT THEIR DISCRETION, VIOLATES THE RIGHTS OF PROPERTY OR PRIVACY GUARANTEED BY THE FEDERAL CONSTITUTION.

The closest approach was the dicta of a lower federal court which said that such *taking* was lawful but that they were to be *returned* to the prisoner or destroyed, upon acquittal. *United States v. Kelly* (C. C. A. 2), 55 F. (2d) 67.

This petitioner, a poor but public minded citizen, being entirely innocent, and so found by the trial court, at great expense to himself, has presented this question to this Court in utmost good faith, as a public service to his 140,000,000 fellow citizens, to have this Court define the limits of the

applicable Constitutional rights, guarantees and immunities.

Politicians and police change the rules from time to time, and each newly elected group of officials, immediately after election, impose their own brand of "constitutional tyranny". The present Indiana statutes plainly and explicitly grant the police,—yes even one single policeman,—the power to personally decide whether or not, to take criminal identification pictures and fingerprints of a citizen immediately upon arrest, irrespective of the reason or suspicion causing the arrest, and before guilt or innocence is established. This alone seems a despotic discrimination by a single policeman.

But once taken, the Indiana statutes complained of, mandatorily require said "criminal identification data" to be widely broadcast and disseminated to the public and forever prohibit their return or destruction, even upon the acquittal of an innocent person.

For example, if some drunken policeman arrested one's innocent and aged mother in the corner grocery store as an alleged shoplifter, of a loaf of bread, and decided to fingerprint and photograph her, these criminal identification data must be published and forever retained. Later proving her innocence and proving the policeman drunk, would not change the asinine results of the present Indiana law. This same mother could never afterwards, as a witness, be asked any question concerning this arrest and acquittal in any court in this land, but under the Indiana statute complained of, such criminal identification data in the hands of the authorities are subject, at their whim, to be shown to the

public forever afterwards. She remains for all time a police character.

But this same mother, accused of shoplifting a loaf of bread, upon her acquittal, would have the loaf of bread returned to her as her property.

Certainly, no present law, state or federal, requires involuntary fingerprinting of all citizens. However, the present Indiana statute permits a trumped up charge and arrest, by officials in office and power, of a political opponent or anyone else in their disfavor, simply to obtain their fingerprints and criminal photographs for the purpose of embarrasing and humiliating them, and no remedy exists under the present Indiana statute. This exact situation, in another state, has already been discussed and the court said:—

> "upon his vindication, the injury to his reputation, by circulation of such information, could not be undone." *McGovern v. Van Riper,* (1945) 137 N. J. Eq. 24, 43A (2) 514.

See also Freund: The Police Power (1904), sec. 103, p. 103; Tiedman: Persons and Property (1900), p. 157. It has been said that the taking of one's fingerprint record would ordinarily convey an imputation of crime. *People v. Hevern,* 215 N. Y. S. 412.

From what has been said, this Court must see the potential dangers in this Indiana statute, which makes this appeal embrace a substantial federal question.

II.

WHEN A STATE COURT HAS DENIED A CITIZEN HIS RIGHTS, PRIVILEGES AND IMMUNITIES, GRANTED BY AND GUARANTEED BY THE FEDERAL CONSTITUTION, IT IS THE SOLEMN DUTY OF THIS COURT TO TAKE JURISDICTION AND CORRECT THE ERROR.

Chief Justice Marshall, in a case a long time ago, said:—

> "with whatever doubts, with whatever difficulties, a case may be attended, we must decide it, if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the Constitution." *Cohens v. Virginia,* 6 Wheat. (19 U. S.) 264, 5 L. Ed. 257.

The right to be heard of this single citizen is not the only point, but must be multiplied by many millions, for his rights are also the rights of all citizens. And this is not confined to the citizens of the State of Indiana, for our laws touch the lives and govern the liberties of every visitor or traveller who comes to or passes through this state.

Justice Frankfurter, only a month ago, said:—

> "This Court must give the freest possible scope to states in the choice of their methods of criminal procedure. But these procedures cannot include methods that may fairly be deemed to be in conflict with deep rooted feelings of the community." *Haley v. State of Ohio,* Case No. 51, Oct. Term 1947, decided Jan. 12, 1948.

Is it too much to suggest that innocent Indiana citizens have deep rooted feelings rebelling at being criminally photographed and fingerprinted and forever classed as criminals or potential criminals in police files all over the country?

Justice Frankfurter, further, in the same case, spoke of this violation of sentiments deeply imbedded in the feelings of our people, citing and supporting his view, the case of *McNabb v. United States,* 318 U. S. 42, a case which petitioner cited in his jurisdictional statement, and which case says:—

> "Experience has therefore counseled that safeguards must be provided against the dangers of the overzealous as well as the despotic."

Our Indiana Supreme Court, in its decision, held this petitioner had property rights and the Rights of Privacy in the matters concerned, but that our recent statutes set these aside. Its interpretation of our statutes and its effect and construction are binding on this Court. *Aero Mayflower, etc. v. Board of Railroad Comm., etc.* Case No. 39, October Term, 1947. Decided December 8, 1947. However, the Supreme Court of Indiana went further, and squarely held that the Federal Constitution and amendments authorized their said interpretations. This court's dismissal of this appeal in effect, would ratify this Indiana statute and thus pave the way for such legislation to be enacted in every other state in the Union, with full approval of this Court, as not being repugnant to the rights guaranteed by the Federal Constitution.

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III.

THE RIGHT UNDER POLICE POWER TO FINGERPRINT A CITIZEN AS AGAINST THE RIGHT OF PRIVACY GUARANTEED BY THE FEDERAL CONSTITUTION TO THE SAME CITIZEN HAS NEVER BEEN DECIDED BY THIS COURT AND PRESENTS A MOST SUBSTANTIAL FEDERAL QUESTION.

The science of fingerprinting to assist police in their activities had its birth about 1890 and has grown rapidly since. In 1890 Justice Louis D. Brandeis, and Samuel D. Warren gave rebirth to the Right of Privacy as guaranteed by our Constitution. 4 Harvard Law Review (1890), p. 193. The boundary line where these two conflicting rights should meet has never been defined by this Court.

Fingerprinting now involves more than 20,000,000 of our citizens. The Federal Bureau of Investigation of the United States Department of Justice protects the Rights of Privacy by maintaining a civilian file apart from the criminal file. See the book "Inside the F. B. I." by Floherty (1943), published by J. G. Lippincott, pp. 22-23. Indiana law denies the Right of Privacy of its innocent citizens by forcing their fingerprints into the only classification it provides—criminal identification files.

The situation created by the Indiana statute and petitioner's appeal therefrom, unquestionably, involves many millions of citizens, and many thousands of law enforcement officers, and the conflict between the police power, on the one hand, and the property rights and Rights of Privacy on the other hand, certainly present a most substantial

federal question which this Court, to date, has never affirmatively decided.

IV.

OUR CONSTITUTION IS PRIMARILY A MONUMENT TO GUARANTEE LIFE, LIBERTY, AND THE PURSUIT OF HAPPINESS TO INNOCENT RESPECTABLE CITIZENS, RATHER THAN A TEXTBOOK FOR POLICE SEARCHING THE MINORITY OF THE CRIMINAL ELEMENT, AND NEW UNDECIDED LIMITS OF POLICE POWER MUST PRESENT A SUBSTANTIAL FEDERAL QUESTION.

This self evident truth was again spoken of by this Court, through Justice Jackson, last month when he said:—

> "We meet in this case, as in many, the appeal to necessity. . . . But the forefathers, after consulting the lessons of history, designed our Constitution to place obstacles in the way of a too permeating police surveillance, which they seem to think was a greater danger to a free people than the escape of some criminals from punishment." *U. S. v. Di Re*, Case 61, October Term, 1947, decided January 5, 1948.

Rogues gallery photographing and fingerprinting of innocent citizens offers a new and undecided question to this Court, but involves old and certain principles. Many of this Court's decisions affect only the rights of the guilty to a fair trial, before they are hung. Thank God the innocent far outnumber the guilty. The magnitude of this present case arises from the fact it involves the rights of millions of the innocent. In this case petitioner never had

any kind of a trial. He lost by demurrer. We humbly and sincerely hope this Court can resolve any doubt and hold the question substantial and note probable jurisdiction.

CONCLUSION

In conclusion, we humbly submit that this Court should vacate its order of February 16, 1948, dismissing this appeal and should note probable jurisdiction thereof, as prayed for, and hear this case on its merits, and render its decision thereon.

Respectfully submitted,

C. JAMES MCLEMORE,
Attorney for Petitioner.

EARL J. WYNN,
Of Counsel.

I Hereby Certify that the foregoing petition is presented in good faith and not for delay.

C. JAMES MCLEMORE,
EARL J. WYNN,
Attorneys for Petitioner.